No. 21180

In the

United States Court of Appeals

For the Ninth Circuit

C. H. Leavell & Company, a Texas corporation, and River Construction Corporation, a Delaware corporation, a Joint Venture, and Allison Steel Manufacturing Co., an Arizona corporation,
Appellants,

vs.

Fireman's Fund Insurance Company, a California corporation,
Appellee.

Brief of Appellee

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JURISDICTION

The appellee concurs in appellants' statement of jurisdiction.

STATEMENT OF THE CASE

By agreement between the parties herein, the case at bar was submitted for decision to the District Court upon an "Agreed Statement of Facts" (T.R. 23-30)* in addition to several exhibits admitted in evidence. The District Court in

*T.R.—Transcript of Record.

its decision (T.R. 31-42) adopted the "Agreed Statement of Facts" as its findings of facts (T.R. 31). The appellants, however, in this appeal did not set forth the "Agreed Statement of Facts" upon which the case was tried, but rather presented a paraphrased and somewhat less than candid version of the "Agreed Statement of Facts." For this reason the "Agreed Statement of Facts" as adopted by the parties and District Court are set forth here:

1. The corporate status of the parties, the citizenship of each party is as alleged in Plaintiffs' Complaint. The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of $10,000.00.

2. On or about November 28, 1961, C. H. Leavell & Company and River Construction Corporation, as a joint venture, (hereinafter referred to as "Leavell") contracted with El Paso Natural Gas Company to construct and erect a single span pipeline suspension bridge over the Flaming Gorge Reservoir in Wyoming, near Dutch John, Utah.

3. On or about December 1, 1961, Allison Steel Manufacturing Co., (hereinafter referred to as "Allison") entered into a subcontract with Leavell, under which subcontract Allison contracted to supply the required materials and construct and erect said bridge.

4. The specifications and design pursuant to which said bridge was to be constructed were prepared by or under the direction of El Paso Natural Gas Company and were submitted to Fireman's Fund Insurance Company (hereinafter referred to as "Fireman's Fund") prior to the time it executed the insurance policy upon which this suit has been brought.

5. Upon the award of the subcontract referred to in paragraph 3 hereof to Allison, Allison prepared and submitted to Leavell drawings and erection procedures plans

detailing and showing how Allison proposed to accomplish the construction and erection of said bridge for approval by Leavell. These plans and erection procedures drawings were not shown to or considered by Fireman's Fund prior to the execution and delivery of said policy of insurance by said Company.

6. Upon the award of said contract by El Paso to Leavell, Leavell applied to Fireman's Fund for a policy of insurance in favor of Leavell "For their account and/or the account of their Subcontractors" and Fireman's Fund issued its "Bridge Builders All Risks" Form insuring said insureds in the sum of $767,206.00 on property described as "Single Span Suspension Pipeline Bridge to be located over the Flaming Gorge Reservoir." The copy of this insurance policy attached to Plaintiffs' Complaint is a true and correct copy of said policy of insurance. This policy of insurance was a form policy prepared by Fireman's Fund.

7. The plans and specifications for said bridge called for the erection of a high, generally "H" shaped tower on each side of the Flaming Gorge Reservoir supporting a set of 6 "main" cables anchored to the ground substantially back from the base of each tower and strung over the top of the tower across the Reservoir Gorge to the top of the opposite tower and in turn anchored in the ground substantially back from the base of the tower. These cables were 2¼" in diameter and served to support the pipeline across the Flaming Gorge Reservoir as suspended by suitable attachments from and below these main cables.

8. A second set of cables was also called for by the plans and specifications known as "wind boom" cables. These cables, two in number, served the purpose of stabilizing the towers against the force of the wind. A boom (a long round timber or pole) was to be attached on the side of each

pull against this steel place, the weld gave way and the wind boom cable fell to the ground, shearing off the wind boom from the tower and causing other extensive damage to the tower and the cable itself.

15. Why the workmen did not follow the proper procedures and use the proper method in attempting to position this wind boom cable has not been established. Either these workmen had not reviewed the required erection procedures in this instance or "took a chance" thereby avoiding the extra work required in going to the top of the tower, disengaging the block and tackle from the top of the derrick and re-attaching it to the corner of the tower at the top of the tower.

16. These derricks were to have been removed from the top of the tower when they had served their purpose as they were not a part of the permanent installation.

QUESTION PRESENTED

The basic issue on this appeal is whether the policy of insurance issued by appellee to the appellants afforded coverage for the particular loss which occurred in this case.

ARGUMENT

There is no dispute as to the actual cause of the accident in question--the employees of the appellant Allison Steel Manufacturing Company (hereinafter referred to as "Allison") failed to follow the proper erection procedures when they used the derrick to lift the wind cables. The method of construction specified in the plans and erection procedure drawings was not followed and as a result the damage occurred. The policy of insurance issued by the appellee Fireman's Fund Insurance Company did not cover any damage or loss if the method of construction was changed during the policy term without approval. The pertinent language of the policy is as follows:

"4. This policy shall be void unless otherwise provided by agreement in writing added hereto, if:

"(a) The general design or method of construction be materially altered or changed during the policy term;"

There is little room for disagreement that if the derrick in question was not designed or intended to be used to lift the wind cable, but notwithstanding this it was used to lift the wind cable, it certainly constituted a material change in the method of construction. This change in the method of construction which caused the loss was precisely the type of risk excluded from coverage. It is obvious that the parties did not intend to purchase a policy of insurance covering the construction and erection of the bridge when the method of accomplishing the construction or erection would be changed by some workmen on the job. The District Court properly found that under the circumstances the policy of insurance did not provide coverage for the resulting loss. The Court said:

> "The Court is of the view that this loss occurred during a period of time when the policy was not in effect because the use to which the derrick was put to lift the wind boom cables constituted a material alteration or change in the method of construction. It was agreed by the parties that the derrick as designed by Allison was intended to be used only for lifting and moving the main cables and was not designed for use in lifting and placing the wind boom cables. To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy." (T.R. 41)

The appellants' main contention is that since the particular erection procedure drawings (Exhibit 2a—d) were not

examined or seen by the insurance company prior to the issuance of the policy, any failure to follow such plans could not constitute a change in the method of construction within the meaning of the exception. The argument is without merit for the reason that the insurer was entitled to place reliance upon the supplemental erection procedure plans detailing how Allison proposed to accomplish the construction of the bridge particularly since such construction plans had to be approved by the Consulting Engineers hired by the El Paso Natural Gas Company (hereinafter referred to as "El Paso").

It should be noted here that the general design of the bridge was set forth in El Paso's plans and specifications (Exhibit 1). However, the method of construction was not fully set forth in El Paso's original plans and specifications but rather these plans contemplated additional plans and working drawings or erection procedures to be later furnished by the contractor (Allison in this case) which were necessary or required to supplement El Paso's plans and specifications. These supplemental plans had to be approved by the Consulting Engineers as required by El Paso's original plans and specifications. A brief review of Exhibit 1 will amply demonstrate this point. Section 2.1.8 entitled "Construction Plans" provides as follows:

> "The Contractor shall prepare such construction plans as are necessary to show in detail the temporary work and *methods of construction* he proposes to use. In order to satisfy the Engineers that the Plans and methods he proposes using in constructing the work will furnish a completed Work in strict accordance with the Plans and Specifications, and within the time limits required, the Contractor shall submit complete prints of such plans to the Engineers, in triplicate, for examination and possible comments." (Emphasis Added)

Section 11.4.1 provides:

> "Considerably in advance of the initiation of erection work, the Contractor shall submit to the Engineers working drawings of the methods of erection and guying which he proposes."

Section 2.1.4 provides:

> "Any deviation from the Plans, the Specifications and approved working drawings as may be required by the exigencies of the construction, shall in all cases, be approved by the Engineers in writing."

It should be noted here that the term engineers referred to in Sections 2.1.8 and 2.1.4 is defined in Section 1.1.2 as the Consulting Engineers hired by the El Paso Natural Gas Company. It should also be noted that the term Contractor used in Sections 2.1.8 and 11.4.1 not only include C. H. Leavell & Company and the River Construction Corporation, but also any subcontractors which, of course, includes Allison Steel. Section 1.1.13 states that the:

> "Contractor shall cause each assignee or sub-contractor to assume all obligations of Contractor hereunder to the full extent same may be applicable to the portions of the Work assigned or sub-contracted."

It is clear that the insurer in determining the risk and in agreeing to provide the policy of insurance was well aware after reviewing El Paso's plans and specifications that there would be additional plans and specifications setting forth such things as the erection procedures for the wind cables and that such plans and specifications would have to be approved by the Consulting Engineers. The erection procedure drawings prepared by Allison Steel (Exhibits 2a—d), setting forth the method of construction for the erection of the wind cables were such additional plans. To

say that these additional plans were not incorporated and included in the general plans and specifications set forth by El Paso for the method of construction of the bridge flies in the face of reason and ignores the circumstances surrounding the entire transaction. The District Court succinctly analyzed the problem as follows:

> "The fact that the plans were not approved by the insurance company, prior to the issuance of the policy, is immaterial here since the company had a right to rely on the method of construction to be submitted in accordance with sound engineering principles.
>
> * * * * * * *
>
> "Certainly the method of construction to be followed in the building of the bridge was incorporated by reference in the policy and was, therefore, an integral part thereof."

It should be observed here that an exhaustive search of the case law has not revealed any decision substantially similar to the controversy presently under consideration. In such a circumstance it is well settled that with regard to the meaning of the words or terms in the policy, the proper criterion for construing such words or terms is to give them a meaning consistent with common understanding. See e.g., *American Casualty Co. of Reading, Pa. v. Myrick*, 304 F.2d 179 (5th Cir. 1962). In this regard the common meaning of the words "method" and "construction" are defined in *Webster's New 20th Century Dictionary*, Second Edition, as follows:

> Method:
>
> "1. a way of doing anything; mode; procedure; process; especially, a regular, orderly, definite procedure or way of teaching, investigating, etc."

Construction:

"1. the act, or process of building, or of devising and forming; fabrication; erection.

2. the manner or method of building; the way in which a thing is made or put together; structure; organization; as, a machine of intricate *construction.*"

There is no question that Allison-prepared supplemental plans (Exhibits 2a—d), detailing how the various cables were to be erected, set forth the "method of construction" for this phase of the building of the bridge and the District Court properly so found. There is also no question that the policy of insurance, although an "all risks" type, specifically and clearly excluded coverage for any loss resulting from an unauthorized change in the method of construction. It is fundamental that where the parties intend that a particular peril be excluded from a policy of insurance and that intent is clearly expressed, effect should be given to the exclusion. *American Casualty Co. of Reading, Pa. v. Myrick*, supra. There is no question that an insurer may lawfully limit liability by excluding certain risks from coverage, and while an insured is engaged in such risks, coverage is suspended. *Roberts v. Underwriters at Lloyds London*, 195 F. Supp. 168 (Idaho 1961). It should be reemphasized here that the purpose of an exception in a policy is to take something out of the contract which would otherwise have been left in. *American Casualty Co. of Reading, Pa. v. Myrick*, supra; *D.M.A.F.B. Fed. Cr. U. v. Employers Mut. L. Ins. Co. of Wis.*, 96 Ariz. 399, 396 P.2d 20 (1964); *Maryland Casualty Co. v. Texas Fireproof Storage Co.*, 69 S.W.2d 826 (Texas 1934).

A careful review of the various exhibits and in particular exhibits 1 and 2 (a—d) will reveal that the District Court's

analysis of the problem and interpretation of the insurance policy coverage question was manifestly correct and although the problem is essentially a legal question, the District Court's careful analysis in this case should be entitled to great weight in this Court. See *Edwards v. American Home Assurance Company*, 361 F.2d 622 (9th Cir. 1966). The appellants' unfounded criticism of the reasoning and ruling of the District Judge who tried the case in the court below is wholly uncalled for. Nothing in the record, or otherwise we might add, justifies the charge that the District Judge "has fallen into error which approaches in degree the harsh appellation of an absurdity" (Br. 10)*; or the statement that the Court "laid aside all consideration of what the parties had in view as the risk insured" and "relied upon reasons for denying coverage which find no support, even remotely, in the language of the policy" (Br. 19); or the statement that the Court's conclusion "must be rejected as wholly without support in contract or insurance law and quite a war with reason and logic" (Br. 20). Nor can we find any justification for the gratuitous remark concerning "a hundred Chinese Coolies pulling upon a rope" (Br. 21).

CONCLUSION

It is respectfully urged that the judgment of the District Court be affirmed.

Respectfully submitted,

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*Br.—Opening Brief of Appellants.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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